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IN THE

Supreme Court of the United States

OCTOBER TERM—1955

No. [redacted] 1

WILLIAM THOMPSON,

Petitioner,

against

COASTAL OIL COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION OF PETITIONER FOR REHEARING

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IN THE

Supreme Court of the United States

OCTOBER TERM—1955

No. 105

WILLIAM THOMPSON,

Petitioner,

against

COASTAL OIL COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION OF PETITIONER FOR REHEARING

Petitioner, William Thompson, a disabled American seaman, respectfully petitions for rehearing in the above entitled matter.

Statement

Petitioner, a seaman, second cook, on respondent's tanker "Rosina Marron", on the night of January 13, 1950, was murderously assaulted on shipboard by another member of the crew, who struck him three blows over the head with a meat cleaver, cutting through both tables of petitioner's skull, and creating an injury diagnosed by two hospitals

and found by both lower courts to be "encephalopathy due to trauma", meaning brain damage due to a blow, or disease of the brain caused by wound or injuries.

In an action for damages in United States District Court, District of New Jersey (Hartshorne, D. J.), plaintiff recovered judgment for $16,000, *i. e.,* $20,000, less $4,000 credited as previously paid. A release once pleaded in an answer (R. 5a-7a) to an original complaint (R. 3a-5a), then not pleaded in the answer to amended complaint (R. 29a-32a), but orally claimed at trial (R. 42a) as "the most important" defense (R. 249a), was held invalid on the proofs.

Respondent appealed to the United States Court of Appeals, Third Circuit. By opinion reported at 221 F. 2d 559, said Court reversed on the ground the release was binding on the seaman. On petition for rehearing before that Court *en banc,* such decision was adhered to, with two judges dissenting.

The seaman's petition for certiorari was granted October 10, 1955 and assigned to the summary calendar. On November 14, 1955, this Court made an order granting petitioner's motion to waive the printing of the record. It would appear that on both occasions all of the nine Justices of the Court participated.

The case was orally argued on January 24, 1956 before a bench of eight Justices, Mr. Justice Harlan not being present.

A judgment of affirmance by an equally divided Court was entered January 30, 1956, six days after argument.

Grounds For Rehearing

1. The two lower Courts, reciting the same evidentiary or subordinate facts (cf. *Offcutt* v. *United States,* 348 U. S. 11, 15 (1954)), and each in effect conceding the basic facts

relied on by the other, have adopted opposite legal tests of the validity of a seaman's release, with opposite results to the parties.

In holding the release invalid, the District Court relied on *mistake,* plus *mistaken representations.*

In holding the release valid, the Court of Appeals relied on *lack of coercion* and *lack of intentional misrepresentations.*

The District Court conceded there was no coercion nor intentional misrepresentation by respondent's agents, but held the release invalid because it was made under *mistake* of both fact and law, and was procured by *"incorrect though not intentionally false statements of both fact and law"* by respondent's agents to an ignorant seaman while still suffering from the effects of a split skull, brain damage and psychoses, and without legal or independent medical advisers of his own.

The Court of Appeals recited in substance the same mistakes, the same incorrect though not intentionally false statements to the unrepresented seaman as were relied on by the District Court, but reversed because there was no coercion nor *intentional* misrepresentation. Indeed, the Court of Appeals *excused and justified* the claim agent's representations as representations which, "being grounded on available and honestly entertained opinion, cannot be made the basis for nullifying this settlement". It further *excused and justified* Dr. Farr's mistake by an equivalent and concurrent mistake of the Staten Island Marine Hospital, with both serving to *excuse and justify* the claim agent's *mistaken* representations. Although the Court of Appeals never once used the word mistake, its decision means that a seaman's release is binding notwithstanding that it is based on *mistake;* for *mistake* (as distinct from fraud) presupposes "honestly entertained opinion".

This presents directly the tremendously important question whether a seaman's release is to be held binding notwithstanding the District Court's finding, supported by both parties' evidence and contentions and not disturbed but in effect confirmed by the Court of Appeals, that the release was based on *mistake* of his rights and disability, plus *mistaken representation* thereof to the seaman by respondent's agents who procured the release. Is it essential that a seaman prove and the Court find *intentional misrepresentation* by respondent's agents in order to invalidate a seaman's release? Or is gross *mistake* and *mistaken representation* of his disability and rights incompatible with the "full understanding of his rights" required to be proved by respondent to validate the release under *Garrett* v. *Moore McCormack Co.*, 317 U. S. 239, 248 (1942)?

As further excuse and justification—as in effect providing the element of "legal advice available to the seaman at the time of signing the release" (*Garrett* v. *Moore McCormack Co., supra,* 317 U. S. 239, 248)—the Court of Appeals cited attempts of attorneys or their solicitors to solicit his case during his hospitalization. The importance of this as implying that a seaman who rejects the solicitations of ambulance chasers and trusts his employer does so at his peril is enhanced by this Court's affirmance by equally divided Court.

The District Court also held the consideration grossly inadequate for the seaman's rights and damages *established at the trial.* The Court of Appeals applied a different test. It held the consideration adequate or "generous" for the rights and damages *believed at the time of settlement.* Under the District Court's theory there is, but under the Court of Appeals' theory there can never be, inadequacy by reason of *mistake* of rights and disability.

This presents directly the tremendously important question whether both "full understanding" and "adequacy of

consideration" required under *Garrett* v. *Moore McCormack Co., supra,* 317 U. S. 239, 248 (1942) are to be emasculated and defeated in the lower Courts by the simple device of determining adequacy by the *mistaken* and *misunderstood* rights rather than by the *fully understood* rights when the *mistake* of rights is discovered.

It is impossible to read the opinions of the District Court and Court of Appeals, in the light of this Court's affirmance of the latter by equally divided Court, without realizing that an early conflict which had largely abated in lower Courts has been emphatically revived by this decision, and a question mark emphatically placed on the great body of decisions holding releases invalid for *mistake,* and even on all law respecting relieving from *mistake.*

So far as we have been able to find, this Court has never hitherto held or indicated, even by equally divided Court or dissenting opinion, nor even respecting people on equal footing and dealing at arms length, that *mistake* cannot be relieved against equally as fraud or coercion, or that *mistake* is compatible with "full understanding".

In *Callen* v. *Pennsylvania R. R. Co.,* 332 U. S. 625 (1948) this Court held, at least indirectly, that "*mistake* as to the nature and extent of the injuries" (332 U. S. 628-629) may be a basis for avoiding a release even where plaintiff had the burden of proof.

But this Court appears never to have settled specifically the fifty-year conflict whether mistake of *prognosis* represents mistake of fact incompatible with "full understanding" so as to invalidate a release. Conflict in the Circuits appears to have commenced with *Lumley* v. *Wabash R. Co.,* 6th Cir., 1896, 76 Fed. 66 (Taft, Lurton and Hammond, JJ.) and *Great Northern Ry. Co.* v. *Fowler,* 9th Cir., 1905, 136 Fed. 118, holding releases no bar, and *Chicago & N. W. Ry. Co.* v. *Wilcox,* 8th Cir., 1902, 116 Fed. 913, holding that "a mistake as to the future effect of a personal injury can-

not have this effect" and reversing *Wilcox* v. *Chicago & N. W. Ry. Co.*, 111 Fed. 435, which had held the contrary. All were cases in which plaintiff had the burden of proof.

The conflict is discussed in *Thompson* v. *Camp*, 6th Cir., 1947, 163 F. 2d 396, 400-401.

Of the Circuits which have passed on the question, the majority have disapproved, ignored or distinguished in a manner amounting to disapproval the Eighth Circuit decision in the *Wilcox* case. And even the Eighth Circuit, in *Lion Oil Refining Co.* v. *Albritton*, 8th Cir., 1927, 21 F. 2d 280, held that an injured releasor had a right to rely on the company doctor's statement that his sight was not affected; if the statements were knowingly false, the release was secured by fraud, but *"If the statements were the honest belief of the doctor . . . there was mutual mistake,"* and *"In either case"* the District Court was warranted in holding the release invalid (21 F. 2d 282).

The preferred view, in accord with most of the Circuits, is stated by Judge Learned Hand in *Scheer* v. *Rockne Motors Corporation*, 2d Cir., 1934, 68 F. 2d 942, 945 (L. Hand, Swan and Chase, JJ.), and by Judge Augustus N. Hand in *Ciletti* v. *Union Pac. R. Co.*, 2d Cir., 1952, 196 F. 2d 50, 52:

> *"There is indeed no absolute line to be drawn between mistakes as to future, and as to present facts.* To tell a layman who has been injured that he will be about again in a short time is to do more than prophesy about his recovery. No doubt it is a forecast, but it is ordinarily more than a forecast; it is an assurance as to his present condition, and so understood." (Italics ours.)

The conflict, hitherto greatly ameliorated both by weight of the opinions of the principle Circuits and by this Court's

decision in *Callen* v. *Pennsylvania R. R. Co., supra,* and substantially abated by the Eighth Circuit's own decision in *Lion Oil Refining Co.* v. *Albritton, supra,* was given ominous renewal by the Third Circuit's decision herein, which used in this *seaman's* case almost precisely the discredited 1902 argument of the Eighth Circuit in the *Wilcox* case. .

Surely, this question should be settled, instead of risking—indeed, almost assuring—that an inconclusive and divisive disposition of this case give unwonted impetus to the revival below of an outmoded conflict which time cannot further illumine.

The greatest difficulty encountered by Petitioner's counsel in the Court of Appeals and here is one of perspective: Respondent's counsel arguing lack of coercion, fraud or intentional misrepresentation where none is claimed, and the inability of Petitioner's counsel to focus attention of the appellate Courts upon the issue of *mistake* determined by the District Court and not disturbed but in effect confirmed by the Court of Appeals.

Viewed out of perspective, or as related to fraud or intentional misrepresentation, the Staten Island Marine Hospital record of first discharge after four and a half months in marine hospitals (Pl's. Ex. 2, R. 319a), at no cost to Respondent, of course tends to disprove *intentional misrepresentation.* But in proper focus, related to the real issue of *mistake,* it simply further and strongly *confirms mistake.* Dated April 28, 1950, it "estimated" he would be fit for duty May 29, 1950, five days before the June 2, 1950 release was signed. But four years later Dr. Farr's own X-ray experts found the 1950 vertical fracture still unhealed (R. 162a).

Marine Hospital Dr. Somberg showed that such of the later records as failed to mention encephalopathy, which

was incurable, did not negative Petitioner's suffering therefrom, these records being concerned with what could be treated and cured (R. 154a-155a). Respondent contended it was the seaman's "hard luck" if he mistakenly "thought he was cured" when he signed the release (R. 51a).

Also the convenient decision in *Keen* v. *Overseas Tankship Corp.*, 2d Cir., 1952, 194 F. 2d 515, viewed with relation to a non-existent question of fraud or intentional misrepresentation, may tend by its date to disprove intentional misrepresentation. But in proper focus, related to the issue of *mistake,* both it and this Court's later decision in *Boudoin* v. *Lykes Bros. Steamship Corp.,* 348 U. S. 336 (1955), conclusively establish *mistake* and misstatement by claim agent Barron of the law. To use them to prove fraud would doubtless give them *ex post facto* effect. But as confirming *mistake* they serve merely as convenient and conclusive evidence. Suppose *Keen* had not been decided before Petitioner's case, and the *Keen* ruling had been made in Petitioner's case instead. The *mistake* of what Barron told Petitioner as to the law would be no less actual. In *Waters* v. *United States,* 9th Cir., 1951, 191 F. 2d 212, and *United States* v. *Johnson,* 9th Cir., 1947, 160 F. 2d 789, there was no convenient decision, but nonetheless a failure through mistake to correctly explain to the seaman all of his legal rights. The fact that the *Keen* case was available here as convenient proof should be taken as conclusively establishing the *mistake* of law.

The questions presented by Petitioner were of tremendous importance for decision by this Court, when the petition herein was filed and the writ granted. The importance of their decision has been increased rather than left as before by this Court's equal division affirmance. Respondent's counsel stated that 90% of seamen's cases are settled (R. 293a). But with the law made increasingly uncertain rather than determined by this Court's equal

division decision, injured man and insurer alike will be unwilling to negotiate. Injured persons will feel they can rely upon nothing told them, but *must* hire lawyer and doctor; claim agents will not know whether or how far they are responsible for "full understanding." Lower Courts, moreover, will be at a loss to know how to decide cases before them. And this will extend to all fields where releases are involved. The energy expended by this Court herein thus far not only will have gone for naught; the situation actually will have been worsened. "Knowledge" to all should be afforded by this Court settling this question of public policy (cf. *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S. 697, 709-710 (1945)).

2. We appreciate that rehearing is discretionary with the Court. But the writ of certiorari, which also is discretionary, is granted to secure uniformity of decision and settle important questions of law, and not for the benefit of a particular litigant.

> *Magnum Import Company* v. *Coty*, 262 U. S. 159, 163 (1923);
> *Rice* v. *Sioux City Memorial Park Cemetery*, 349 U. S. 70, 74 (1955).

A decision by an equally divided Court, though binding on the parties, settles no point of law.

> *Etting* v. *The Bank of United States*, 11 Wheat. (24 U. S.) 59, 78 (1826);
> *Washington Bridge Co.* v. *Stewart*, 3 How. (44 U. S.) 413, 424 (1845);
> *Hertz* v. *Woodman*, 218 U. S. 205, 212-214 (1910).

This Court throughout its history accordingly has sought to avoid rendering equally divided Court decisions except in cases of necessity.

Mayor of New York v. *Miln,* 8 Pet. (33 U. S.) 120, 122 (1834);
Rice v. *Sioux City Memorial Park Cemetery, supra,* 349 U. S. 70, 73, 79 (1955).

Since the days of Chief Justice Marshall, continuing through the past term, this Court has exercised its discretion to grant rehearing where equal division of the Court has prevented the settling of important questions, particularly when there is available an additional Justice to insure breaking the apparant deadlock in the Court.

Mayor of New York v. *Miln,* 8 Pet. (33 U. S.) 120, 122 (1834), where two Justices "were absent when these cases were argued"; 9 Pet. (34 U. S.) 85 (1835), where there was a vacancy due to death; decided 11 Pet. (36 U. S.) 102 (1837) by full bench;
Commercial Molasses Corp. v. *New York Tank Barge Corp.,* 313 U. S. 541, 596, affd. on rehearing 314 U. S. 104;
Toucey v. *N. Y. Life Ins. Co.,* 313 U. S. 538, 596; revd. on rehearing 314 U. S. 118;
N. Y., Chicago & St. L. R. R. Co. v. *Frank,* 313 U. S. 538, 596, affd. on rehearing 314 U. S. 360;
Gray v. *Powell,* 312 U. S. 666, 313 U. S. 596, revd. on rehearing 314 U. S. 402;
Baltimore & Ohio R. R. Co. v. *Kepner,* 313 U. S. 542, 597, affd. 6-3 on rehearing 314 U. S. 44;
Bernards v. *Johnson,* 313 U. S. 537, 597, affd. unanimously on rehearing 314 U. S. 19;
Lisenba v. *California,* 313 U. S. 537, 597, affd. 7-2 on rehearing 314 U. S. 219;
Reitz v. *Mealey,* 313 U. S. 542, 597, affd. on rehearing 314 U. S. 33;
Halliburton Oil Well Cementing Co. v. *Walker,* 326 U. S. 696, 327 U. S. 812, revd. 8-1 on rehearing 329 U. S. 1;

Bruice's Juices v. *American Can Company,* 327 U. S. 758, 812, affd. on rehearing 330 U. S. 743;
MacGregor v. *Westinghouse Electric & Mfg. Co.,* 327 U. S. 758, 812, revd. on rehearing 329 U. S. 402;
Rice v. *Sioux City Memorial Park Cemetery,* 348 U. S. 880 (1954), dismissed on rehearing 349 U. S. 70 (1955);
Ryan Stevedoring Co. v. *Pan-Atlantic Steamship Corp.,* 349 U. S. 901, 926 (1955), affd. on rehearing 100 L. ed. adv. ops. 146 (1956);
Indian Towing Co. v. *United States,* 349 U. S. 902, 926 (1955), revd. on rehearing 100 L. ed. adv. ops. 83 (1955).

Formerly, equal division of the Court was not reported until it had been ascertained after intensive study of the case and the briefs of the parties by the whole Court that "Consequently, the principles of law which have been argued *cannot be* settled" (*Etting* v. *The Bank of United States, supra,* 11 Wheat. (24 U. S.) 59, 78 (1826)). We appreciate that the volume of the Court's business today necessitates a more summary administrative rule; and that "the equal division of the Court *forestalled* that intensive study attendant upon opinion writing" (*Rice* v. *Sioux City Memorial Park Cemetery, supra,* 349 U. S. 70, 75 (1955)). On rehearing the decisions of unanimous affirmance in *Bernards* v. *Johnson;* affirmance 7-2 in *Lisenba* v. *California;* affirmance 6-3 in *Baltimore & Ohio R. R. Co.* v. *Kepner,* and the decision of *reversal* 8-1 in *Halliburton Oil Well Cementing Co.* v. *Walker* necessarily invoved changes of opinion after intensive study. And the *reversals* in *Toucey* v. *N. Y. Life Ins. Co.; Gray* v. *Powell; MacGregor* v. *Westinghouse Electric & Mfg. Co.* and *Indian Towing Co.* v. *United States, supra,* notwithstanding prior equal division affirmance, further show the importance of rehearing before a full bench.

For this reason and because there also is a ninth Justice available to break any deadlock, we respectfully submit, rehearing is eminently desirable both because of the tremendous importance of the questions involved, and also because both the guardianship theory and the "clearly erroneous" rule afford strong reason for reexamining what amounts in effect to having overturned by equally divided Court the conscientious determination of the primary guardian District Court in favor of the seaman ward.

We appreciate, of course, that this Court's equal division decision formally affirmed the Court of Appeals' reversal rather than this Court itself reversing the District Court. But the practical as distinct from technical effect, we submit, is the same as though this Court by equal division had itself *reversed* the guardian District Court.

The Court of Appeals' decision took no account of Rule 52(a) and this Court's holding in *McAllister* v. *United States,* 348 U. S. 19, 20 (1954) that:

> "the Court of Appeals may not set aside the judgment below unless it is clearly erroneous" (348 U. S. 20).

If the Court of Appeals "departed from this standard" (348 U. S. 20), it is *only* this Court which has decided the clearly erroneous question and this by equal division. If the Court of Appeals did not depart from this standard, this Court, nevertheless, also has determined by equal division whether the District Court's findings are clearly erroneous, under the *McAllister* rule that:

> "In relation to the District Court's findings we stand in review *in the same position as the Court of Appeals.* The question, therefore, is whether the findings of the District Court are clearly erroneous" (348 U. S. 20-21).

Either way, this Court in effect has overturned by equal division the District Court determination.

Bearing in mind that seamen are not ordinary litigants but "are emphatically the wards of the admiralty" (*Garrett* v. *Moore McCormack Co., supra,* 317 U. S. 239, 246), whose contracts, especially their releases are "subject to careful scrutiny" (317 U. S. 248), a grave question is presented whether decision by equally divided Court should ever go *against* the seaman ward, particularly when there is a ninth Justice to insure breaking any continued deadlock, and the rehearing before a full bench will permit the intensive study which was forestalled by the even division of the Court. Whether the District Court be held sole guardian, or primary guardian with this Court the Supreme guardian, surely the question whether the primary guardian's determination is to be approved or disapproved warrants reconsideration, where decision by even division for administrative reasons only, operates *against* rather than in favor of the Court's ward.

Thompson, the petitioner, was a simple minded negro, born in Georgia, who was a member of the old Seamen's Union. Thompson had a natural aversion to lawyers who offered unsolicited advice. He, like many other seamen, believed in the "company." While plaintiff's action was at common law, plaintiff on counsel's advice waived a jury in order to avoid delay in the trial. The substantive law of the sea is the same whether the case is tried at law or in admiralty. Judge Hartshone has shown by the record that he heard every bit of evidence at the trial and questioned each witness. He ascertained exactly what took place at the time when the release was executed and concluded that the seaman had underestimated by far the nature and extent of his injury and his legal rights.

The fact that he had gotten an advance of $300 from the claim adjuster and made a trip to Hot Springs, Arkansas where he bathed in the hot springs, made him feel so much better that he thought he was cured, and this belief was further induced both by the Staten Island Hos-

pital estimate on April 28, 1950 that he would be fit for duty by May 29, 1950, and by agent Barron telling him Dr. Farr's May 18, 1950 prognosis of three months' disability. The District judge was acting in place of a jury and he was acting as the "guardian of his ward," a seaman.

Whether the seaman's release is before a United States District Judge sitting in admiralty or at law as jury and court, he is exercising the *power of a guardian* and his judgment of facts and conclusions of law should not be disturbed, unless he *has abused his discretion.*

We have never seen a record wherein a judge more thoroughly and competently interviewed witnesses and appraised evidence than did Judge Hartshone in trying this case. The Court's relation to the seaman as guardian, and the District Court's function as guardian to jealously guard the seaman's rights should not be jeopardized by an equal division decision forestalling careful study of the record on which the guardian District Court acted, and careful appraisal of the completely different perspective indicated by the opinions of the District Court and Court of Appeals.

Wherefore, petitioner respectfully prays that a rehearing be granted herein, and that the judgment of the Court of Appeals be reversed and the judgment of the District Court reinstated and affirmed.

Respectfully submitted,

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Of Counsel:

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MARTIN G. STEIN.

Certificate of Counsel

SILAS B. AXTELL, counsel for the above-named petitioner, does hereby certify that the foregoing petition and application is presented in good faith and not for delay.

SILAS B. AXTELL,
Counsel for Petitioner.

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JOHN T. FEY, Clerk

IN THE

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No. [redacted] 1

WILLIAM THOMPSON,

Petitioner,

against

COASTAL OIL COMPANY,

Respondent.

BRIEF FOR RESPONDENT ON REHEARING.

At this point, the Respondent does not wish to unnecessarily burden this Court with a lengthy brief on the law but wishes the Court to refer back to its original brief filed before the original argument and merely stress certain highlights, and reply to the two principal issues mentioned by the Petitioner in his petition for rehearing.

On this rehearing, the Respondent respectfully submits that the Court has already adequately laid down the rules for determining the validity of a seaman's release in *Garrett* v. *Moore-McCormack*, 317 U. S. 239 and we urge the Court to reiterate that holding and to affirm the Third Circuit Court's opinion that there was compliance with the rules established therein at the time petitioner executed his release for $4,000.00.

For this Court's convenience, it would be well to summarize here Justice Black's ruling in the *Garrett* Case as the Third Circuit did in its opinion below, 221 F. 2d 559:

"From that case the following principles emerge:

(1) The burden of proving the validity of a release rests upon one who sets up the release and this burden can be carried only by showing that 'it was executed freely without deception or coercion.' 317 U. S. page 248, 1942 A. M. C. page 1651).

(2) The release must be shown to have been fairly arrived at and made by the seaman with a full understanding of his rights.

(3) "The adequacy of the the consideration and the nature of the medical and legal advice available to the seaman *at the time of signing the release* are relevant to an appraisal of this understanding." (Emphasis supplied) (317 U. S. page 248, 1942 A. M. C. page 1652).

Viewed by these standards we think the release here in issue is binding."

While this Court is concerned principally with questions of law, it is necessary in this instance to review the many facts surrounding the execution of the release in order to determine its validity, and for this reason Respondent respectfully draws the attention of the Court to the summary of the facts contained in its counter-statement of the case contained in its original brief. From this it will appear that the Circuit Court was most justified in reversing the District Court and that the District Court's holding the release invalid was "clearly erroneous".

It is clear that Petitioner does not deny that he had had experience in executing previous releases; that he voluntarily approached the Respondent and instituted settlement negotiations; that he knew he had a fractured skull; that he knew the Marine Hospital had discharged

him after several months of treatment with a certificate that his condition was improved and that he would be able to go back to work in a month; that the "Company Doctor" found that he had a fractured skull and was suffering from considerable nervous shock and should not return to work for at least three months; also that the "Company Doctor" found that he would have a 10% permanent disability whereas the Marine Hospital did not predict any percentage of permanent disability; that the "Company" gave him advances to take certain recuperative treatment which Petitioner himself expressed a desire to receive and which Petitioner did receive before instituting settlement negotiations; that while Petitioner did not actually retain an attorney, he had considerable opportunity to do so which he declined.

What Petitioner does however, is to argue vaguely and hypothetically about "mistakes", mistaken misrepresentations, and mistaken medical prognosises which do not appear in the record. Actually, the Marine Hospital discharged Thompson with a diagnosis of a fractured skull and encephalopathy due to trauma. The Marine Hospital predicted that he would be able to go to work in a month. Dr. Farr, the Company doctor, predicted three months. In fact, Thompson went back to work shortly after executing the release, one month before Dr. Farr, the Company doctor, predicted and worked steadily for four years until the time of trial.

Respondent merely asks the Court this question, where is there any evidence of mistaken representation or mistaken prognosis? No one said that Thompson did not have a fractured skull; no one predicted that he would never have pain again; no one predicted that he would never need treatment again. While Respondent hesitates to emphasize facts to this Court, it is clearly in the record that all

admissions to the Marine Hospital subsequent to the time of the execution of the release were for causes unrelated to the assault such as ulcers, urethritis, kidney trouble, and penal sore, with the exception of two outpatient visits to the Marine Hospital at Staten Island, New York, just before the trial where a routine examination of the skull showed that was "no evidence of fracture or pro-longed increased inter-cranial pressure".

Respondent submits that there is absolutely not only no evidence of any mistakes, but that the test as stated in the *Garrett* Case should be the adequacy and nature of the medical advice available to the seaman at the time of the signing of the release. But aside from the facts surrounding Thompson, certainly, the validity of a seaman's release cannot be determined upon the infallibility of competent and impartial medical authority.

The Court will appreciate that in his petition for rehearing, the Petitioner emphasized the non-existent mistake of medical prognosis and steered clear of the fact that Thompson had settled a case of "questionable liability", after approximately five months disability for $4,000.00. In this connection, the Respondent respectfully draws the Court's attention to its discussion of the *Keen and Boudoin* Cases on page 25 of its original brief. The Third Circuit held when establishing the validity of Thompson's release that the *Keen* Case could not be given "ex post facto" effect. But even if the *Keen and Boudoin* Cases are considered to have retroactive effect, there is still the question as to whether Thompson's assailant was the type character who would render the vessel on which Thompson was employed unseaworthy. The only uncontroverted evidence regarding the assailant was that he was effeminate. That the alleged homosexual act occurred prior to the assault was

disputed by Respondent. Again, Respondent asks this Court, as it did on page 29 of its original brief, "Will this Court go so far as to hold a ship unseaworthy if it employs a man who has effeminate characteristics?" Petitioner argues strictly from emotion when it states that Petitioner was a simple minded negro who had a natural aversion to lawyers and who believed in the "Company". (On page 13 of its petition for rehearing.) There is no evidence like this anywhere in the record. This is the sort of argument used by counsel in summation before a jury.

On pages 8 and 9, the Petitioner infers that the amicable settlement of the great majority of seamen's cases is prejudiced by the holding of Thompson's release valid. Respondent submits that if a release entered into under the circumstances existing at the time Thompson signed this release is set aside, that the effect on the amicable adjustment of seamen's claims will be most disadvantageous. It would create more litigation. It would encourage the reopening of settled cases merely because of a few outpatient visits subsequent to executing the release, because that's all Thompson ever did. It would virtually require the retainment of counsel, a private physician, and determination by at least a District Court before a compromise would be effectively terminated. There would undoubtedly be further congestion added to the already crowded State and Federal Courts. It is to the seaman's advantage that he can act freely and independently, that he be permitted to speedily conclude adequate and amicable settlements where the requirements previously established by this Court in the *Garrett* Case have been complied with. Certainly a release obtained under the circumstances here should be considered more than a payment on account.

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